SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIATION, INTER-INSURANCE BUREAU,

Appellant,

vs.

WALLACE K. DOWNEY, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,

Appellee

STATEMENT OF MATTERS OR GROUND MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES AND MOTION TO AFFIRM THE JUDGMENT FROM WHICH THE APPEAL IS TAKEN OR TO DISMISS THE APPEAL.

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CALIFORNIA STATE AUTOMOBILE ASSOCIATION, INTER-INSURANCE BUREAU,

Petitioner & Appellant,

vs.

WALLACE K. DOWNEY, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,

Respondent and Appellee

STATEMENT OF MATTERS OR GROUND MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF ~~THE~~ UNITED STATES AND MOTION TO AFFIRM THE JUDGMENT FROM WHICH THE APPEAL IS TAKEN OR TO DISMISS THE APPEAL.

While the appellee must concede that technical grounds of jurisdiction of this appeal inhere in the Supreme Court of the United States, there remains the question of whether the Federal question here presented is substantial. (Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States," pp. 95-98, citing *Equitable Life Insurance Co.* v. *Brown*, 187 U. S. 308, 311, 23 Sup. Ct. Rep. 123, 47 L. Ed. 190)

Appellee contends that no substantial Federal question is presented by this appeal. Appellant raises no question as to "procedural due process", that is, it makes no argument that it did not receive full hearing on adequate notice. Its appeal therefore presents only the one major question of what may be called "substantive due process".

Question Presented

Appellee contends that the legal question, as presented by appellant on page 3 of its statement as to jurisdiction, is both too narrowly circumscribed, in that it omits reference to one of the two statutes which comprise the legal framework of which the compulsory assigned risk statute is only a part, and is too broadly or ambiguously drawn in its assumption of matters of law and fact which, as hereafter shown, are not justified by the record. Appellee therefore presents the following as its concept of the major issue presented by this appeal:

Where:

(1) A statute provides for the suspension, regardless of fault, of the license of the operator of any motor vehicle involved in an accident in which injury to any person or property damage in excess of $100 results, unless the operator is insured or puts up a bond or cash deposit;

(2) Another statute, passed at the same session of the legislature, requires that every automobile liability insurer subscribe to and operate under a plan, approved or issued by the State Insurance Commissioner, whereby applicants for automobile liability insurance "who are in good faith entitled to but are unable to procure such insurance through ordinary methods" are to be "equitably" apportioned among those insurers, and such a plan is so approved or issued;

(3) A reciprocal or interinsurance exchange is one of those insurers but fails or refuses to subscribe to the plan, this reciprocal having been organized many years ago by, and having been continuously operated ever since organization by, a particular automobile club (a nonstock membership corporation) of the type common in the United States, for the sole purpose of providing insurance for the members of that club and having continuously, since organization, confined its insurance to such club members; and

(4) Pursuant to the statute requiring subscription to the plan, the Insurance Commissioner suspends the certificate of authority of the reciprocal for its failure or refusal to subscribe to the plan, thereby terminating the reciprocal's right to enter into or renew any more contracts of automobile liability insurance:

Does the statute requiring subscription to the plan, or the plan issued or approved pursuant to the statute, or the order of the Commissioner suspending the certificate of authority, violate the Fourteenth Amendment to the Constitution of the United States by depriving the reciprocal or its members of property or liberty without due process of law?

Statement of Facts

(a) *Facts Respecting the Differences Between Appellant's and Appellee's Presentation of the Question Here Involved*

It will be noted that the foregoing question as presented by appellee differs from appellant's version substantially in respect to the following points:

(1) That while the statute requiring subscription by the insurer to the plan is the one here directly under attack, the statute which subjects the automobile operator to sus-

pension of license in the event of accident, regardless of fault, is viewed by appellant as a vital part of the legal framework, the whole of the framework being part of the true issue here. The Court appears to have taken that view in the opinion under appeal Statement as to Jurisdiction, pp. 26, 41, 43; 96 A. C. A. 973, 981, 994, 995). The provisions of the latter statute are set forth, *infra*, under "(b) The Statutes".

(2) The cooperative nature of the automobile club, to members of which appellant has heretofore confined the issuance of its insurance, and which organized appellant (Statement as to jurisdiction, pp. 4-5): The only evidence in the record as to the nature of the automobile club are exhibits "I", "I-1" and "I-2" for identification, introduced in the transcript of the hearing before the Insurance Commissioner of the State. These—and any judicial knowledge of any court (Cf. *Smythe* v. *Cal. State Auto Assn.* (9th Cir.), 175 Fed. 752; *Chattanooga Automobile Club* v. *Commissioner*, 12 Tax Court 967, affirmed U. S. Court of Appeals, 6th Circuit, June 1, 1950, — Fed. 2d —), can only result in the same inference—demonstrate that appellant's affiliate is neither a consumers' nor a marketing cooperative, as that term is commonly understood, but is cooperative only in the sense that any membership corporation carrying on a particular type of activities for the benefit of its members is cooperative; that is, it is a typical automobile club. In the sense in which appellant uses the term, every mutual insurance company and every reciprocal or interinsurance exchange is a "cooperative".

(3) The type of persons to be insured under the assigned risk plan: Appellant's statement that these "risks are so hazardous that no insurer will accept them voluntarily" (Statement, p. 4) is extreme in its nature, and prob-

ably not applicable to the bulk of the risks. Appellee has used the words of the statute in its version of the question. Commissioner's Exhibit "2", introduced at the hearing before the Commissioner, the Plan itself, in Sections 2430 to 2431.8 (California Admin. Code, Title 10) excludes what appear to be the really perilous risks. (See the court's digest of these provisions in the opinion. 96 A. C. A, 973, 984, Statement as to Juridiction, pp. 27-30.) Inability to procure insurance by *ordinary* methods does not mean that *no* insurer will take the business. It means that the usual solicitation by an agent or broker does not produce a carrier. There is no requirement that applicants must take special measures which will exhaust the insurance market before applying under the Plan (California Admin. Code, Secs. 2440, 2442 (a)). These risks as a class are substandard from an underwriting point of view, but it cannot, on the basis of any present known data be said that they are so hazardous that *no* insurer will take them voluntarily.

(4) The use of the term "compel it to issue insurance" (Statement as to jurisdiction, pp. 3-4) in referring to the impact of the statute on the insurer. Appellant might retort that by the State's means of forbidding issue of further insurance, the insurer is practically compelled to accept the plan. However, there is a difference. There is no "compelling" in the sense in which a water company may be compelled to render service to a home, or a railroad to a shipper. Appellee has therefore phrased the question on this point as confined to the facts in the record.

(5) In reference to subjecting "each participant in the reciprocal to the damage liabilities of the unwanted risks" (Statement as to jurisdiction, p. 4): Again, this is a rhetorical expression which is correct only in the qualified sense that *each one* of the policyholders in a mutual insurance company and *each one* of the policyholders and

stockholders in a stock insurance company is subjected to the damage liabilities of *every* policyholder covered by insurance in the particular company. In this respect appellant's insureds do not differ from those of the various mutual, reciprocal, and stock insurers who write the automobile liability insurance of the California public. Appellant argues that under its power of attorney now in use—the organic document of a reciprocal or interinsurance exchange such as appellant—each member is "bound" for the losses of every other member (Statement as to jurisdiction, p. 16). This is the theory of reciprocal operation, and the theory of the operation as described by the Court (Appendix to Statement as to Jurisdiction, pp. 20-21, 96 A. C. A. 973, 976-977). The point is that the partnership is *limited*.

Appellant's powers of attorney are in evidence (Exhibits "A", "B", "C", "D", "E" and "G"). Each recites that it is to be exercised in conformity to the Rules and Regulations of the Insurance Board of the Bureau, which rules and regulations are also in evidence (Exhibit "F" at the hearing before the Commissioner). Clause (6) (e) of the rules and regulations provides for the securing of a certificate of non-assessability from the Insurance Commissioner. This is to secure the insured an immunity from assessment under Section 1401, California Insurance Code, which reads so far as pertinent:

"If an exchange subject to this article has a surplus of admitted assets over all liabilities in a sum equal to one and one-half times the minimum paid-in capital required of incorporated insurers issuing policies on a reserve basis and doing the same classes of insurance, then the Insurance Commissioner, upon written request, shall issue his certificate stating such fact. Subscribers at an exchange so certified shall have no liability for assessment on policies issued while such certificate remains in effect. • • •"

The validity of such a limitation on assessment of policyholders appears to be settled under California law. (*Miller* v. *Johnson*, 4 Cal. 2d 265, 48 Pac. 2d 956.)

It follows that, since the insureds of appellant cannot be assessed to pay losses each is "bound" only to the extent of the premium deposit specified in his policy just as a policyholder in any other type of insurer is "bound" only to the extent of the premium specified in his policy. This being the case, the theoretical insurance of each by all the rest of the insureds ceases to be any distinguishing element in the question, since appellant's insureds are in substantially the same position as to losses as in the case of any policyholder of any insurer.

(b) *The statutes*

To assist the Court in achieving a full picture of the operation of the assigned risk plan here under attack, we supplement appellant's mention of the provisions of the plan (Statement as to jurisdiction, pp. 5-6) by quoting sections 2495 and 2498 thereof (Cal. Administrative Code, Title 10):

> "2495. Any applicant, insured or insurer under the Plan who is affected by any act, ruling, decision or order of an insurer, the Manager or the Committee, and believes such act, ruling, decision or order to be in conflict with or not authorized by the provisions of the Plan or by the law, may appeal in writing in the first instance to the Committee, setting forth his grounds for such belief. If any member of the Committee is an officer, employee or other representative of an insurer which is a party to the matter, the other members of the Committee shall designate another person representative of the same group or class of insurer represented by such Committee member to replace him for the purpose of hearing the appeal. The Committee shall review all evidence and consider all statements, argu-

ments, and contentions at a hearing upon not less than five days' notice to the parties to the matter, and within five days thereafter shall notify such parties of its decision which shall be binding upon all parties, subject to appeal to the Commissioner.

"If any party to a matter which has been so appealed to the Committee is dissatisfied with the decision of the Committee upon such appeal, he may appeal to the Commissioner who shall hear the parties, review the matter and render a decision which shall be binding upon all parties."

"2498. Every insurer admitted to transact liability insurance shall subscribe to this Plan. Such subscription shall be filed with the Commissioner not later than the effective date of this Plan or upon application for admission to transact liability insurance and shall be in the following form:

"Whereas, the Insurance Commissioner of the State of California, after public hearing upon published notice, has approved and issued, pursuant to Article 4, Chapter 1, Part 3, Division 2 of the California Insurance Code, a plan for the equitable apportionment, among insurers admitted to transact liability insurance in the State of California, of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods, which plan has been designated as the 'California Automobile Assigned Risk Plan' and is by reference incorporated herein and made a part hereof, and

"Whereas, the undersigned is an insurer which either is presently admitted to transact liability insurance in the State of California or has applied for Certificate of Authority or renewal Certificate of Authority to transact liability insurance in the State of California and is required by the provisions of Section 11620 of said Code to subscribe to and participate in such Plan.

"Wherefore, pursuant to the provisions of said Section 11620 of the California Insurance Code, and in consideration of its admission to transact liability insurance in the State of California, the undersigned insurer hereby subscribes to said California Automobile Assigned Risk Plan and agrees to participate therein in accordance with the terms thereof.

"This subscription and agreement shall be deemed to have been executed in the State of California and the interpretation and enforcement thereof shall be governed by the laws of that State.

"In witness whereof ..... has to these
(Name of Insurer)
presents affixed its seal and caused its name to be subscribed and attested by its .....
(Title of Officer)
and ..... on the ... day of ... 194 .
(Title of Officer)

.....
(Name of Insurer)

By .....
(Name of Officer)

(SEAL)

Attest:

.....
(Name of Officer)

.....
(Title of Officer)."

Appellant, as mentioned above, does not set forth the sections of the California Vehicle Code which subject an uninsured driver to suspension of driver's license when he is involved in an accident. So far as pertinent, these read as follows at the time of enactment of the statute here under attack (Amendment in 1949 has not changed the

obligation imposed on the driver, being primarily for clarification):

"420. Security Required Following Accident. (a) The department shall, within 60 days after the receipt of a report of a motor vehicle accident within this State which has resulted in bodily injury or death or damage to the property of any one person in excess of one hundred dollars ($100), suspend the license of each operator of a motor vehicle in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this State, unless such operator shall deposit security in a sum which shall be sufficient in the judgment of the department to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against such operator or owner. Notice of such suspension shall be sent by the department to such operator not less than 10 days prior to the effective date of such suspension and shall state the amount required as security.

"(b) Subdivision (a) shall not apply under the conditions stated in Section 420.1 or to any of the following:

"(1) To such operator if the owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident:

"(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him:

"(3) To such operator if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the department, covered by any other form of liability insurance policy or bond; or

"(4) To any person qualifying as a self-insurer under Section 420.7.

"(c) No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do business in this State, except that if such motor vehicle was not registered in this State, or was a motor vehicle which was registered elsewhere than in this State at the effective date of the policy or bond, or the most recent renewal thereof, such policy or bond shall not be effective under this section unless the insurance company or surety company, if not authorized to do business in this State, shall execute a power of attorney authorizing the director to accept service on its behalf of notice or process in any action upon such policy or bond arising out of such accident; provided, however, every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, or not less than five thousand dollars ($5,000) because of bodily injury to or death of one person in any one accident and subject to said limit for one person, to a limit of not less than ten thousand dollars ($10,000) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than one thousand dollars ($1,000) because of injury to or destruction of property of others in any one accident.

"(d) Upon receipt of notice of such accident, the insurance company or surety company which issued such policy or bond shall furnish for filing with the department a written notice that such policy or bond was in effect at the time of such accident."

The Question at Issue Does Not Present a Substantial Federal Question

It is respectfully submitted that while this Court has not directly passed upon the question, the highest Courts

of two major industrial States have asserted the power of the State to impose even more drastic conditions, as to acceptance of risks, upon continuance of the business. In re *Opinion of the Justices* (Mass., 1925), 251 Mass. 569, 147 N. E. 681; *Factory Mutual Liability, etc. Co.*, (Mass., 1938), 300 Mass. 513, 16 N. E. 2d 38; (Tex., 1928), *Texas Employers' Ins. Assn.* v. *U. S. Torpedo Co.*, 8 S. W. 2d 266; *Harris* v. *Traders and General Ins. Co.*, (Tex., 1935), 82 S. W. 2d 750. The statutes involved in those cases required acceptance of every applicant to a particular insurer, instead of, as in this case, providing equitable apportionment among all insurers writing the particular type of insurance.

The only published case denying this power to the State appears to be *Employers' Liability Assurance Corp.* v. *Frost* (Ariz., 1936), 48 Ariz. 202, 62 Pac. 2d 320. This case, however, rests also upon another ground, i.e., the discrimination in the application of the power made by the statute involved, between types of insurance companies. It fails to notice any of the above Massachusetts or Texas cases above published prior to its date. (96 A. C. A. 973, 986-987, Appendix to Statement as to Jurisdiction, p. 4.)

While this Court has recognized the power of the State to subject the cooperative type of insurance company, such as appellant, to regulation (*Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 63 Sup. Ct. Rep. 602, 87 L. Ed. 777), and while this Court has not passed directly on the question involved, it has inferentially recognized the State's power in this respect by refusing to require the convening of a three-judge Court to consider the question as to whether the insured could be required to procure such insurance as a condition to being permitted to drive his automobile. *Ex parte Poresky*, 290 U. S. 30, 54 Sup. Ct. 3, 78 L. Ed. 152.

In that case the statute involved in the Massachusetts cases cited above was under attack. Leave was sought to file a petition for writ of mandamus requiring a Federal District Judge to convene a three-judge court under section 266 of the Judicial Code. The petitioner had filed suit in the United States District Court against various officers of the State of Massachusetts to enjoin enforcement of the Massachusetts compulsory automobile liability insurance statute. Petitioner alleged that the Registrar of Motor Vehicles of Massachusetts had refused to register his automobile because he had not posted bond nor procured liability insurance as required by the statute and that he could not comply with the statute. The District Judge had dismissed the complaint for lack of jurisdiction as there was no diversity of citizenship and *no substantial Federal question.*

This Court in a *per curiam* opinion denied leave to file the petition, saying:

> "* * * the District Judge clearly has authority to dismiss the want of jurisdiction when the question lacks the necessary substance and no other ground of jurisdiction appears. Such was his authority in the instant case, in view of the decisions of this Court bearing upon the constitutional authority of the State, acting in the interest of public safety, to enact the statute assailed * * * (citing U. S. Supreme Court cases) * * * See, also, Opinion of the Justices, 251 Mass. 569; 147 N. E. 681 * * *" (290 U. S. 30, 32, 54 Sup. Ct. Rep. 3, 78 L. Ed. 152.)

The statute involved required, on the one hand, that every person registering an automobile in Massachusetts must furnish a surety bond or an insurance policy to cover liability for damages arising out of operation of the vehicle and, on the other hand, that an insurance company writing automobile liability insurance in that State must, upon his

application, furnish the insurance to that person, subject only to justification for refusal before a State Board. (Chap. 90, General Laws of Mass., *Opinion of the Justices, supra.*)

Since this Court has held that no substantial Federal question is presented by the requirement that the automobile owner procure the insurance, it would appear that no substantial Federal question is presented by the requirement that the insurers make it available to him, particularly where, as in this case, the imposition of the duty upon the insurer is accompanied with provision for equitable distribution of that obligation.

It is therefore respectfully submitted that the Federal question here involved lacks substance and therefore gives no jurisdiction.

MOTION.

Accordingly, appellee does now hereby move that the judgment here under appeal be affirmed, or, in the alternative, that this appeal be dismissed.

Dated: August 11, 1950.

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